IN THE

# Supreme Court of the United States

October Term, 1974

No. 74-1429

MARINA B. SIMES and VALERIE S. PARKER,

*Petitioners,*

*vs.*

ROBERT C. HAASE, JR., Esq., MARIA ELENA HAASE; HARBOR SAVINGS & LOAN ASSOCIATION (USLIFE SAVINGS), a California corporation, *et al.*,

*Respondents.*

**Petition for a Writ of Certiorari to the Supreme Court of California.**

MARINA B. SIMES and
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*Petitioners in Propria Persona.*

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*Respondents.*

**Petition for a Writ of Certiorari to the Supreme Court of California.**

## Introduction.

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of California, entered on February 13, 1975.

## Opinion Below.

The opinion of the Court of Appeal of the State of California, Second Appellate District (Division Two) is printed in Appendix "A" hereto, and is unreported.

## Jurisdiction.

The judgment, printed in Appendix "A" hereto, which is sought to be reviewed was entered December 19, 1974.

A rehearing by the Court of Appeal of the State of California, Second Appellate District (Division Two) was denied on January 15, 1975, without opinion

(set forth in Appendix "C" hereto). A Petition for Hearing in the California Supreme Court was denied, without opinion on February 13, 1975.

The jurisdiction of this court is invoked under Section 1257(3) of Title 28 of the United States Code.

**Questions Presented.**

The Plaintiffs brought suit under Sections 1501, 1504 and 2924(c) of the Civil Code of California in order to have the trustee's sale declared void, and to maintain a quiet title action (Clerk's Transcript [C.T. 252-263], Third Amended Complaint) to recover title and possession of Plaintiffs' real property under Code of Civil Procedure Section 738; and subject to Section 318 thereof, the five-year statute of limitations section applicable to actions to recover real property. The questions thereby arising are:

1. Whether a lower court on demurrer may violate Plaintiffs' right to their land, as provided in Section 1, Amendment XIV, of the United States Constitution, where it overlooked Plaintiffs' paid-for extension to August 19, 1968, of the maturity date of their land loan (App. Op. Br., p. 2, paragraph 2), and accordingly the period of limitations did not run until that date—within three years of the complaint filed August 9, 1971.

2. Whether a foreclosure of land is permissible in violation of Plaintiffs' rights as provided in Section 1, Amendment XIV of the United States Constitution, after acceptance of tender and no default existed [C.T. 256, paragraph X].

**Constitutional Provisions Involved.**

Constitution of the United States, Amendment XIV, Section 1:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1501, Civil Code of California:

> "Objections to mode of offer. All objections to the mode of an offer of performance, which the creditor has an opportunity to state at the time to the person making the offer, and which could be then obviated by him, are waived by the creditor, if not then stated."

Section 1504, Civil Code of California:

> "Effect of offer on accessories of obligation. An offer of payment or other performance, duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof."

Section 738, Code of Civil Procedure of California:

> "Action to quiet title to real and personal property. An action may be brought by any person against another who claims an estate or interest in real or personal property, adverse to him, for the purpose of determining such adverse claim; . . ."

Section 318, Code of Civil Procedure:

> "Seisin within five years, when necessary in action for real property. No action for the recovery of real property, or for the recovery of possession

thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the property in question, within five years before the commencement of the action."

**Statement of Case.**

In view of the fact that on demurrer (sustained by trial court without leave to amend) all of the allegations of the complaint are deemed to be true, we take the liberty of setting forth such allegations herein as facts in a condensed version, however, as follows:

On or about November 16, 1964, Plaintiffs and Petitioners herein entered into a written agreement with sellers Nando and Rachel Hirschfeld for the purchase of the real property in question, the total consideration being $34,500. The Plaintiffs made payment of $12,-500 to the Hirschfelds, cashing out sellers' interest, and title to the property and eventually placed in Plaintiff Parker's name.

At the same time, Plaintiffs assumed the $22,000 two-year standing land loan—which was renewable by payment of a 3% bonus two-year renewable fee, interest and taxes—securied by a promissory note and deed of trust held by defendant and respondent herein Harbor Savings & Loan Association (USLIFE Savings).

On September 29, 1966, in compliance with noteholder respondent Harbor's demand to renew, Plaintiffs duly made payment of $2,000 to Harbor which included the 3% two-year fee to renew to August 19, 1968, plus interest and taxes to November 1, 1966. Payment on principal was not demanded since it was not a requirement for renewal of a "standing" land loan.

On September 29, 1966, this $2,000 payment was unconditionaly accepted, cashed and used by Harbor until October 10, 1966, when Harbor's secretary, without prior communication regarding either the notice of default or sale, returned Plaintiffs' payment of $2,000 as insufficient and caused Notice of Default and Election to Sell to be filed by the trustee as provided by the governing statute (Civil Code Section 2924) wherein it was stated that the interest and taxes were unpaid and declared that the entire principal of the note ($22,000) was delinquent. Defendants and respondents Haase herein knew of all of these facts.

Subject land was sold at foreclosure on February 16, 1967, to the prevailing and only bidders at the sale, defendants Haase, for about $24,688, although the market value at the time of the sale was approximately $50,000.

**Grounds for Petition.**

Plaintiffs contend that both the trial court and the Court of Appeal, in its written opinion, Appendix "A" hereto, incorrectly interpreted the facts, alleged equities and the law, as affirmed by the California Supreme Court, in effect, by its denial, without opinion, of Plaintiffs' Petition for Hearing in the State Supreme Court, as set forth in Appendix "B", annexed hereto.

It is submitted that said decision of the Court of Appeal, Appendix "A" hereto, is inconsistent with and misconstrues the statutory and case law of the State of California, the statutory and case law of other states as reported in the widely recognized law texts of Corpus Juris Secundum and American Law Reports, citing numerous state and federal cases wherein, in essence, the unconditional acceptance of all delinquencies con-

stituted an election not to proceed with the default on the part of the noteholder, and the condition upon which the holder may declare the whole note due does not exist, where the interest is no longer unpaid, and the creditor cannot take advantage of a prior delay, which he has already waived.

The decision of the Court of Appeal (see Appendix "A"), as affirmed by the State Supreme Court (see Appendix "B", *supra*), presents important questions of law, in that its effect is to seriously impede the flow and security of real estate transactions and create uncertainty in the protection afforded to trustors under the terms of the deed of trust, or mortgage. Said decision further deprives Appellants and Petitioners here of their property without due process of law under the Fourteenth Amendment and without a hearing by the court on the merits.

**Unconditional Acceptance of All Delinquencies Constituted an Election Not to Proceed With the Default.**

Plaintiffs, in their Petition for Rehearing to the Court of Appeal (at pp. 3-5 thereof), specifically set forth their answer to said Court's principal point (p. 3, item 7 of said Petition), namely:

> "Plaintiffs' theory of their right to quiet title to the property is simply that the sale under the deed of trust was invalid since the plaintiffs were not in default at the time of sale."

Plaintiffs (at item 8, p. 3 of said Petition) pointed out to the Court that when respondent lender Harbor's loan came up for renewal, Plaintiffs met, in good faith, and paid said lenders' demand of $2,000 on September

29, 1966, to cure any and all delinquent interest and taxes, which, it is pointed out, significantly included Harbor's 3% two-year loan renewal fee as its bonus to extend the maturity date of the trust deed note to August 19, 1968, which, above all precluded lender's option thereafter to accelerate on October 10, 1966. This principle is predicated on the California Supreme Court case of *Trinity County Bank v. Haas,* 151 Cal. 553, 91 Pac. 385 (1907), cited with approval in *Bisno v. Sax,* (1959) 175 Cal.App.2d 714, 346 P.2d 814; 97 A.L.R.2d 1013; 33 Cal.Jur.2d 741, §348, 1974 Pocket Part 49 (see App. Pet. for Rehrg., pp. 3-5).

> "If then *before* the exercise of the option the debtor pays the accrued interest, the condition upon which the holder may declare the whole note due does not exist. The interest is no longer unpaid, and the creditor cannot take advantage of a prior delay, which he has already waived." *U.S. Central Trust Co. of N.Y. v. Worcester Cycle Mfg. Co. Conn.,* 93 Fed. 712, 35 C.C.A. 547.
>
> "A stipulation in the mortgage postponing the right to foreclose until a period later than the maturity of the secured debt or obligation will be strictly construed but is valid and will be given due effect."

Plaintiffs further pointed out to the California Supreme Court, in their Petition for Hearing, at pages 5-7 thereof, that the decision of the Court of Appeal in the instant case diametrically opposes the principles enunciated and the results reached in the published opinion of said Supreme Court in the *Trinity* case, above, and thus not in accordance with "uniformity of decision"

required to sustain a lower court ruling, as set forth in California Rules of Court, Appellate Rule 29(a).

Said Petition for Hearing additionally pointed out that the Court of Appeal ignored California Civil Code Sections 1500, 1501, and 1504, as applied in said *Trinity* case, which as a matter of law precludes respondent Harbor's right to accelerate its demand for payment in full of the trust deed note, and thus its subsequent Notice of Default and Election to Sell and resultant foreclosure sale thereafter were void.

In *Lichty v. Whitney*, 80 Cal.App.2d 696 (1947), the court there ruled that the sale at foreclosure while no default existed was void, plaintiffs duly made tender of payment having been refused by defendant, and the lien upon subject real property in question, on which the foreclosure sale was based had been at the date of the sale, discharged.

The Court of Appeal decision ignored all of the foregoing and thus it was submitted that a hearing in the California Supreme Court is necessary to the "settlement of (the aforesaid) important questions of law," under said Appellate Rule 29(a), which provides in pertinent part:

> "A hearing in the (California) Supreme Court after decision by a Court of Appeal will be ordered (1) where it appears necessary to secure uniformity of decision or the settlement of important questions of law; . . ."

## REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI.

Petitioners respectfully submit that the facts here, as pleaded in their Third Amended Complaint [C.T. 252-263] state that respondent lender Harbor Savings & Loan Association demanded and accepted unconditionally the $2,000 in payment of delinquent interest, taxes and a 3% (of $22,000 principal) two-year loan renewal fee to renew said land loan to August 19, 1968.

Plaintiffs' original complaint was filed August 9, 1971, within three years of the aforesaid extended maturity date of said trust deed note; and that fact coupled with the respondent Harbor's demand for and unconditional acceptance of said $2,000 as tendered by Plaintiffs cured the default by operation of law.

Thus, Plaintiffs submit that they timely filed their complaint within three years of the extended maturity date of said loan, and further that all of the aforesaid show that a void sale occurred when no default existed; subject to the five-year statute of limitations under the aforesaid Code of Civil Procedure Section 318; wherein a quiet title action for recovery of real property can be maintained.

When a deed of trust authorizes sale only on default by the debtor, as in the instant action, there is no authority for the sale and a deed issued pursuant to such a sale is void (*Slaughter v. Qualls,* Supreme Court of Texas) 162 S.W.2d 671 (1942) [C.T. 109-110 and 118-121]), and an action to try title lies and the proper statute of limitations is the one applicable to actions to recover real property, *i.e.*, Section 318 of the Code of Civil Procedure (See Petition for Hearing in Cali-

fornia Supreme Court, pp. 9-10; and App. Reply Brief, pp. 11-12). (See also *87 Corpus Juris Secundum*, p. 1123, note 50; and *37 Texas Jurisprudence* 2d 135-136, note 10.)

Therefore, Plaintiffs contend that the final judgment by the California Supreme Court, sustaining defendants' demurrers without leave to amend, where Plaintiffs' title and right to their property has been taken from them, wherein a trial on the merits has been barred, constitutes a deprivation of a person's property "without due process of law" and "equal protection of the laws" under Section 1 of the Fourteenth Amendment of the Constitution of the United States.

That such judgment by the California Supreme Court is thus subject to review by Writ of Certiorari by the United States Supreme Court under Section 1257(3) of Title 28 of the United States Code, where the Petitioners have been deprived of the "title and right" to their property "claimed under the Constitution."

**Conclusion.**

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari to the California Supreme Court should be granted.

MARINA B. SIMES and
VALERIE S. PARKER,
*Petitioners in Propria Persona.*

## APPENDIX A.

### Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

Marina B. Simes and Valerie S. Parker, Plaintiffs and Appellants, vs. Robert C. Haase, Jr., Maria Elena Haase, and US Life Savings & Loan Assn., (formerly Harbor Savings & Loan Assn.), Defendants and Respondents. 2d Civil No. 43670, L.A.S.C. No. C 9283.

FILED: Dec. 19, 1974.

Plaintiffs in a quiet title action appeal from orders of dismissal entered following the sustaining, without leave to amend, of a demurrer to the third amended complaint. The original complaint in this matter was filed August 9, 1971, and was captioned "Complaint To Set Aside Trustee's Sale, For Quiet Title, Declaratory Relief and Damages." The third amended complaint is simply captioned "Third Amended Complaint To Quiet Title To Real Property."

We accept the essential allegations to the complaint as true for the purpose of testing the issues raised by the demurrer. (*Hopper v. Hopper*, 224 Cal.App.2d 446; *Byrne v. Harvey*, 211 Cal.App.2d 92; *Gressley v. Williams*, 193 Cal.App.2d 636.) Those allegations set forth that plaintiffs acquired a parcel of unimproved real estate in the Palos Verdes area in the year 1965. The property was encumbered by first trust deed which secured a promissory note in the amount of $22,000.

That security was held by defendant Harbor Savings and Loan. In 1966, plaintiffs were in default on the promissory note. On September 2, 1966, Harbor Savings and Loan accepted a check in the amount of $2,000, which acceptance cured the default on the note.

Subsequently, on October 10, 1966, Harbor notified plaintiffs that it refused to accept the $2,000 as curing the default and demanded additional sums of money. Simultaneously, Harbor tendered the $2,000 back to plaintiffs. Plaintiffs refused to accept said tender. Subsequently, Harbor issued a written notice of default and election to sell and on February 16, 1967, pursuant to said notice and election, the property was sold to defendants Haase who were the only bidders at the sale and who, according to the complaint, had full knowledge of the above recited facts.

Plaintiffs' theory of their right to quiet title to the property is simply that the sale under the deed of trust was invalid since the plaintiffs were not in default at the time of the sale.

Approximately 4½ years elapsed between the date of the trustee's sale and the filing of the complaint in this action. The trial court in its order sustaining the demurrer specifically stated that the relationship between plaintiffs and Harbor was founded on a written contract, to wit, the promissory note and the deed of trust and that the wrongful institution of the foreclosure proceedings breached the underlying contractual relationship between the parties.

Citing *Leeper v. Beltrami*, 53 Cal.2d 195, the trial court concluded that even though the complaint was captioned an action in quiet title, that the four-year statute of limitations of Code of Civil Procedure section 337(1) was applicable and that the instant action was barred.

In *Leeper*, the court reviewed the entire problem of which statute of limitations is applicable to an action to recover real property.

"If the action is one essentially to recover the real property, the five-year section applies. . . . [W]here the action is to cancel a deed, even though the ultimate aim of the action is to recover real property, section 343 of the Code of Civil Procedure is applicable. That is the section providing for a four-year time limit as a catchall for actions not previously specifically covered. . . . [W]here the gravamen of the action is fraud, the three-year provision of section 338 subdivision 4, applies, even if the relief prayed for is cancellation and the recovery of real property. . . . Thus the modern tendency is to look beyond the relief sought, and to view the matter from the basic cause of action giving rise to the plaintiff's right to relief." (*Leeper v. Beltrami, supra*, at pp. 212, 214.)

In the instant case it is patently clear that plaintiffs' success in recovering the real property turns on their ability to set aside the trustee's sale and cancel the deed which flowed therefrom. As of February 16, 1967, when the allegedly improper sale took place, plaintiffs had a cause of action for equitable relief to

set aside the sale. (*System Inv. Corp. v. Union Bank*, 21 Cal.App.3d 137.) That cause of action is subject to the provisions of Code of Civil Procedure section 343 providing a four-year period for actions not covered by other statutes.

Applying the principle of *Leeper, supra,* and looking to the underlying cause of action we conclude that the four-year statute of limitations of Code of Civil Procedure section 383 is applicable to this action even though plaintiffs have attempted to characterize the action as one for the recovery of real property. Since plaintiffs have pleaded no facts which would excuse the delay of over four years from the date of the trustee's sale and deed, and since the pleadings admit plaintiffs had knowledge of the sale as of the time of the occurrence, the instant action is barred.

The orders are affirmed.

NOT FOR PUBLICATION

Compton, *J.*

We concur:

Fleming, Acting *P. J.*

Beach, *J.*

## APPENDIX B.

Clerk's Office, Supreme Court, 4250 State Building.
San Francisco, California 94102.
Feb. 13, 1975.

*I have this day filed Order* Hearing Denied.

*In re:* 2 Civ. No. 43670 Simes *vs.* Haase.

*Respectfully,*

G. E. BISHEL
*Clerk*

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## APPENDIX C.

*Los Angeles. Cal.* Jan. 15, 1975.

TITLE:

Simes, et al. vs. Haase, Jr. et al. *No.* 43670.

The Court: Petition for rehearing denied.

Clay Robbins, *Clerk*

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